DOCUMENT RESUME

ED 249 299 UD 023 750

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TITLE Affirmative Action: The Scheduled Castes and the Scheduled Tribes.
PUB DATE May 84
NOTE 30p.; For conference proceedings, see UD 023 748.
PUB TYPE Reports - Descriptive (141) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Affirmative Action; *Caste; Elementary Secondary Education; Equal Education; *Equal Opportunities (Jobs); Equal Protection; Ethnic Groups; Ethnic Relations; Foreign Countries; *Government Role; Religious Cultural Groups; *Social Discrimination; *Social Integration; Social Isolation; Social Stratification
IDENTIFIERS *India

ABSTRACT

This paper considers Indian affirmative action policies that provide reservations (quotas) in favor of two disadvantaged groups, the scheduled castes and the scheduled tribes. First, definitions and background are presented. The scheduled castes ("untouchables") are said to suffer from social segregation, and the scheduled tribes from geographic isolation. Constitutional provisions and legislative reservations, intended to uplift these populations and guarantee their representation in government, are discussed. Problems of group membership are then addressed. These problems, it is noted, are complicated by religious teachings and inter-group marriage, and are most conspicuous when individuals apply for civil service positions. The conceptual basis of reservations ("social justice") and their qualitative and quantitative aspects are detailed. The remainder of the paper focuses on jobs and positions, land ownership, and education of scheduled castes and tribes. Much progress is said to have been made, but new social tensions have arisen since the implementation of affirmation action programs. These problems, it is asserted, will not be resolved until the ethnic criterion for affirmative action is replaced by a criterion based on lack of privilege. (KH)

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# AFFIRMATIVE ACTION:

# THE SCHEDULED CASTES AND THE SCHEDULED TRIBES

by

B. Sivaramayya

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# INTERNATIONAL PERSPECTIVES ON AFFIRMATIVE ACTION

A Bellagio Conference

August 16-20, 1982

The Rockefeller Foundation

May 1984

# AFFIRMATIVE ACTION: THE SCHEDULED CASTES AND THE SCHEDULED TRIBES

B. Sivaramayya

A distinctive feature of the Constitution of India is its provisions providing for "reservations" ("quotas" in the American parlance) in favor of two disadvantaged groups, namely, the scheduled castes and the scheduled tribes. These reservations exist: (1) in the state legislatures and the union legislature or Parliament, (2) in services under the states, and (3) in educational institutions. In addition, some states have reservations in services under the state and in educational institutions in favor of other backward classes. Reservations coupled with other welfare programs constitute the core of affirmative action for the uplift of these groups. The aspects relating to affirmative policies and programs in favor of the scheduled castes and scheduled tribes will be considered in this paper.

## Background

As pointed out by Beteille, the scheduled castes and the scheduled tribes share the common disabling feature, that is, "exteriority."[1] But the nature of exteriority from which they suffer differs in its origin and practice. The scheduled castes suffered from segregation and the scheduled tribes from isolation. The need for protective discrimination or affirmative action in the case of the former arose because they were the victims of the practice of untouchability and other forms of social injustices. "Untouchability" is traced to a verse of Manu[2] that says: "But the dwellings of Chandalas and Svapakas shall be outside the village, they must be made Apapatras, their wealth [shall be] dogs and donkeys."[3] Apapatras in this verse means that the vessels used by them should be destroyed.

Many causes gave rise to "untouchability."[4] Of these two deserve special mention. Persons engaged in unclean occupations like scavenging,

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flaying of animals, and tanning became untouchables; and the offspring of a prohibited marriage--a Brahmin woman and a Shudra man, for example --were expressly stated to be untouchables.[5]

The later social practices served only to increase the social disabilities of untouchables. Even though Manu did not say that the shadow of an untouchable was polluting, it was so considered in later times, at least in some regions. The untouchables could not draw water from the wells and tanks used by the caste Hindus. They were denied the use of public roads and transport; their women could not dress in the manner other Hindu women did, nor could they wear jewelry. Over centuries, they were confined to occupations that were low paid and considered unclean. The agrestic slavery that prevailed in some regions was largely confined to the untouchables and tribals, which served to aggravate their disabilities. Their share in agricultural land, which is the key to Indian economy, was negligible.

The scheduled tribes can be classified broadly under three main groups. First, the tribes living in the north and northeastern zones in the valleys and in the eastern frontiers of India. Second, tribes inhabiting the central belt of hills and plateaus along the dividing line between peninsular India and the Indo-Gangetic Plain, and, third, tribes dispersed over the extreme corners of southwestern India in the hills and covering portions of the Ghats. According to anthropologists, these tribes fall into three distinct racial types. The tribes belonging to the first category belong to the Mongoloid type, the second to Australoid, and the third to Negroid racial groups. They constitute about 7 percent of the population of India and speak 106 mother tongues. The tribals who were living in inaccessible regions were cut off from the main currents of development and were exploited by the more advanced people of the plains.

## Constitution and Affirmative Action

The Indian Constitution is conspicuous in that the duty of the state to uplift the weaker sections of society, like the scheduled castes and the scheduled tribes, has been built into the provisions

of the Constitution, instead of leaving it to the administrative policies and their approval by the judiciary. The general spirit behind the concern of the Constitution for weaker sections is reflected in the directive principle of the state policy laid down in Article 46, which states: "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."[6] Services under the state became the focus of attention for historical and economic reasons. In the south, in the province of Madras and in the native state of Mysore, the governments fixed quotas for services under the government on the basis of populations of castes. The policy was referred to as the communal G.O. (government order). The avowed object of the policy was to break the dominance of the Brahmin community in the services. Therefore, there was a natural inclination to adopt that caste-based precedent in the case of scheduled castes and scheduled tribes. The undeveloped nature of the country's economy at the time of independence and the dominant role of the state enterprise,[7] subsequently, made reservations almost the sole option before the founding fathers of the Constitution and the policy-makers who came after.

Article 15 of the Constitution, which prohibits discrimination, says: "The State shall not discriminate any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."[8] The word "only" in the article is significant, for it is open to the state to discriminate on grounds like poverty. To remove the barriers of constitutional challenge to protective discrimination in favor of disadvantaged groups, Clause 4 of the article provides: "Nothing in this article or in cl. 2 of Article 29 shall prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."[9]

Article 16 guarantees equality of opportunity in services under the state.[10] To facilitate the implementation of policies relating to reservations, Clause 4 of that article provides: "Nothing in this

article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."[11]

The specific enactment of provisions relating to reservations under the Constitution has one positive aspect. The policy itself has been rendered immune from an attack on its constitutionality on the grounds of offending equality before the law. The reservations have been held to be "reasonable classification."[12] The attacks are directed not on the principle but on the modalities pertaining to its execution. The position may be contrasted with that in the United States in which the Supreme Court observed: "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."[13]

The concern of the Constitution for the uplift of the scheduled castes and the scheduled tribes once again finds expression in Article 335, which states that "the claims of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration in the making of appointments to the services and posts in connection with the Union or of a State."[14]

Reservations in Legislatures

Under the constitutional scheme, only members belonging to the scheduled castes or the scheduled tribes can contest for the reserved seats, but they are chosen by the general electorate. Thus a candidate contesting for a reserved seat must, apart from fulfilling the qualifications required of a general candidate, belong to specified castes or tribes.

Formerly, the constituencies were double-member constituencies. A voter was given two ballots. In the counting of votes, no distinction was drawn between the general and the reserved seat. The only limitation was that of the two members declared elected, one should belong to the specified caste or tribe. In other words, a reserved candidate, even

though he secured fewer votes than an unsuccessful candidate contesting for the general seat, would be deemed to have been elected. But if both the reserved candidates secure higher numbers of votes than the general candidate, they would be deemed to have been elected. In V. V. Giri v. D. S. Dora,[15] two candidates who filed their nominations for the reserved tribal seat only secured more votes than the candidate standing for the general seat. They were declared to have been elected, one for the general and the other for the reserved. The Supreme Court, interpreting the relevant section of the Representation of the People Act (1951), upheld the decision. To overcome such cases, the double member constituencies have been abolished and replaced by single member constituencies.

As to the number of seats reserved in the case of scheduled castes or the scheduled tribes in the House of People (Lok Sabha), Article 330 says that it "shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that state in the House of People as the population of the Scheduled Castes or of the Tribes as the case may be (in respect of which seats are so reserved) bears to the total population State."[16] However, in states or union territories where they constitute a majority, the scheduled tribes are not entitled to any reservations in the legislature.

Originally, the reservations in legislatures were to expire after 20 years. But they have been extended to a period of 40 years by amendments in 1969 and 1980.

Problems of Group Membership

The benefits of affirmative action have been conferred on groups. Article 341 empowers the president to specify by a public notification "the castes, races or tribes or parts of groups within castes, races or tribes" as the scheduled castes for purposes of the Constitution.[17] The notification with respect to a state should be made after consulting the governor of the state. Article 342 provides for a similar notification with respect to the scheduled tribes.[18] Pursuant to these powers, the Constitution (Scheduled Castes) Order, 1950, and the Constitution

(Scheduled Tribes) Order, 1950, have been passed. Of these the former deserves attention.

The Constitution (Scheduled Castes) Order, 1950, now gives a list of 1,041 castes in its schedule.[19] The first point that deserves attention is that only "Hindu" and Sikh scheduled castes can claim the benefits of reservation. On this, Paragraph 3 of the order states that "no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of the Scheduled Caste." The Supreme Court held that the order of the president is conclusive.[20]

An enigma underlying the above provision needs notice. The Sikh religion, like Christianity, does not believe in the caste system. But in spite of this, among the Christians of the south and among the Sikhs, the Hindu social practices relating to caste have permeated. Thus, caste distinctions are observed by the followers of these religions to a considerable extent, even though it is opposed to their respective theologies. But only Sikh scheduled castes, apart from the Hindu scheduled castes, are entitled to the benefits of reservation. This anomalous exception has its basis on the demands made by the leaders of the Sikh community at the time of the framing of the Constitution and concessions made at that time.[21] Alexander notes that Pulayas (the scheduled caste converts to Christianity in Kerala) have come back to the Hindu fold to avail themselves of the benefits of reservations.[22]

Buddhism does not recognize the caste system. Dr. Ambedkar in his later years became a Buddhist and urged his followers to become Buddhists. At his behest, many renounced Hinduism and adopted Buddhism. The question arose as to whether a person converted to Buddhism ceases to be entitled to the benefits of reservation. It should be noted that the term "Hindu" in its wider sense includes not only persons who are Hindus by birth, but also those belonging to its reformist offshoots like the Buddhists, Jainas, Sikhs, Arya Samajists, etc. It is in this wider sense that all legislations dealing with topics like marriage, divorce, adoption, succession, apply the term. In Punjab Rao v. Meshram, Meshram, who was a member of a scheduled caste, declared in public that he embraced

Buddhism.[23] He later contested a reserved seat and won. His opponent challenged his election on the ground that Hindu scheduled castes alone are entitled to contest for reserved constituencies; and that Meshram, having become a Buddhist, ceased to be a scheduled caste. The Supreme Court accepted the plea and held the election void. It also held that the term "Hindu" in Paragraph 3 of the order had been used in a narrow sense; and that it was immaterial in itself that this conversion was not in strict compliance with the formalities.

Mr. Raj Bhog undertook a fast to make the government change the rule. But the then union home minister, Shri Charan Singh, was opposed to the extension of benefits of reservations to the neo-Buddhists on the ground that some neo-Buddhists will be entitled to the benefits, while others would not. This he pointed out would mean the introduction of a caste system among the neo-Buddhists.[24]

The existing reservations in favor of ethnic groups have given rise to other problems relating to membership of the group even in the absence of renunciation of the faith. Formerly, the rule that the bride and the bridegroom should belong to the same caste was adhered to, and violations of it were rare. Tribal groups also observed the traditional rules relating to prohibitions in marriage. In the case of caste groups in particular, the changes in the law of marriage in 1946 and subsequently in 1955 removed the preexisting bars relating to caste.[25] The growing interactions of tribals with nontribals have given rise to mixed marriages. Similarly, under the traditional law for a valid adoption, the caste of the person who was adopting and the boy who was being adopted should be the same. (The traditional law recognized the adoption of boys only and not of girls.) But considerations of caste in adoption have been rendered wholly irrelevant under the Hindu Adoptions and Maintenance Act of 1956. The question that has arisen before the courts is this: When a member belonging to a scheduled caste marries a woman who is not a member of the scheduled castes, or when a member of a scheduled tribe marries a woman who does not belong to the scheduled tribes, is the woman entitled to the privileges of reservation? We are here primarily concerned with

the position of the wife because her social status in India as yet follows that of the husband. Similarly, a question has arisen when a person who is a member of a scheduled caste adopts a boy or girl who is not a member of a scheduled caste. Is the adoptee entitled to the benefits of reservation? These questions need to be considered not only with reference to the short-term objectives of distribution of benefits of reservation and the prevention of their misuse, but also in the light of long-term goals of promotion of fraternity, which find explicit mention in the preamble to the Constitution.

In Urmila Ginda v. State, Urmila, a lady belonging to a high caste, married Fl. Lt. Ginda, a member of a scheduled caste.[26] She applied for a post and she was placed second on the list of selected candidates. But she did not get the job. On making inquiries, she was told that the post was reserved, and that she, being a member of a higher caste herself, could not be given the post merely on the ground of her marriage with a scheduled caste person. A single judge of the High Court who heard the writ petition was of the view that she was not entitled to any relief. The judgment gives two reasons as to why a person belonging to a higher caste could not be considered for a post reserved for the scheduled castes. First, there is the possibility of the abuse of the provision that enables a person of a higher caste to be considered as a scheduled caste. Second, it enables a person who is not subject to the same kind of social and educational backwardness to compete for the post. But viewed from the point of social change, such marriages deserve encouragement. A report of the Commission for Scheduled Castes and the Scheduled Tribes, submitted in 1979, recommended that where one of the spouses is a member of a scheduled caste and the other is not, some concessions in recruitment to services may be given to the nonscheduled caste spouse.[27]

In Khazan Singh v. State, Khazan Singh, who was a Jat, a nonscheduled caste, was adopted by Kishan Lal, a member of a scheduled caste.[28] He secured a scheduled caste certificate on the basis of the adoption and obtained a job as a subinspector of police. Subsequently, his appointment was canceled on the ground that he was not a member of a

scheduled caste by birth. The learned judge in the main relied on the language of Section 12 of the Hindu Adoptions and Maintenance Act, 1956, which says that an adopted child shall be treated as a child of the adoptive father or mother "for all purposes." Therefore, full effect was given to the statutory provision. Referring to the possibility of abuse, he stated:

> The worst that could be said is that borrowing a leaf from the "tax-planner's" note-book in regard to the permissible, if not exactly laudable, practice of taking advantage of loop hole in the law, the petitioner has done a bit of "career-planning." Since it is lawful, if it has the legal effect for which he contends it has to be given effect to and it is not permissible to refuse to give the legal effect because the course was adopted by the petitioner to obtain the post in Government service.[29]

Ranganathan, J., further added:

> There could be adoptions in the other directions as well and also adoptions with the more laudable object of promoting social harmony . . . . In the long run it may be found that the principle contended for by the petitioner in the present case may not be really opposed to the object and scheme of the Constitution in regard to reservation for Scheduled Castes and Scheduled Tribes. On the other hand if genuine adoptions, both ways, become frequent they may eventually lead to the development of that social equality at which the Constitution aims.[30]

On the other hand, the Elayaperumal Committee (as popularly called) voiced its concern at fake adoptions as a device to evade the policy behind reservations. It noted that out of 28 seats reserved for the scheduled castes in 1968-69 in Rajasthan, 16 were taken by those who had secured scheduled caste certificates on the basis of adoptions.[31] The committee noted further that according to reports received by it, the practice is prevalent in the states of Uttar Pradesh and the Punjab. It recommended that scheduled caste certificates should not be issued to nonscheduled castes on adoption.

## Conceptual Basis of Reservations

What has been noted before leads to the question as to the conceptual basis behind reservations. A judge of the Supreme Court of India referred to reservations as a "conceptual disaster area."[32]

Nickel, in the context of the Defunis case, referred to three "principles" in justification of affirmative action programs,[33] namely, the compensatory principle, the distributive justice principle, and the utility or welfare principle. In the Indian context, the following principles should be noted: (1) compensatory principle--that is, compensation for past injustices; (2) protective principle--protection of the weaker sections of the community as envisaged in Article 46 of the Constitution; (3) proportional equality; and (4) social justice, under which concepts of distributive justice and utility are included to a large measure, if not wholly.

Gross raised forceful objections to the principle of compensation as a justification for reverse discrimination or affirmative programs.[34] The basic questions are as Guzzardi put it: "On which sons should the sins of the fathers be visited? And for how many generations?"[35] The compensation is not to the actual victims, nor is it given against the actual perpetuators of the social injustices. These are valid arguments in the Indian context, also. The compensation principle can have validity, if at all, in the case of scheduled castes only, but not in the cases of other groups like the scheduled tribes or other backward classes. But the fact that ex-untouchables who became converts to Christianity or Buddhism or some other religion are not entitled to avail of the benefits of affirmative action shows that the policy is not based on compensation. Further, the cost or burden of reservations falls upon Muslims and Christians who were in no way responsible to the historical injustice committed against the scheduled castes. As Beteille points out: "Protective discrimination can and should seek to satisfy present needs; it can do nothing to repair past injuries."[36]

The protective principle merits attention in view of the broad directive of Article 46, which states that "the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation." Also, the words "protective discrimination" have gained

currency in academic writings to denote affirmative programs. If the protective principle is understood in its wider sense as protection from all forms of social injustices, then it falls appropriately within the principle of social justice. But if we view the principle in a narrow sense as involving the situations of exploiters and exploited or even privileged and nonprivileged in Indian society, then reservations cannot be viewed as involving "protection" of some groups. For, in reservations, whether they pertain to jobs or seats in educational institutions, we come across individuals competing for positions, which is different from situations involving exploiters and exploited. It ought not be overlooked that there are some in the nonpreferred groups who have disadvantages similar to those in the preferred groups. Further, even those who are economically better off among the scheduled castes and the scheduled tribes are entitled to avail themselves of the benefits by virtue of their membership in the group. Thus, the protective principle cannot be considered as the basis of reservations.

Mathew, J., in his opinion in State of Kerala v. N. M. Thomas,[37] relied upon the principle of proportional equality as the basis for reservations. He referred to the decisions in Griffin v. State of Illinois[38] and Douglas v. State of California.[39] He also noted the statement of Justice Harlan in Griffin's case that "the real issue . . . is not whether Illinois has discriminated but whether it has a duty to discriminate." Mathew, J., stated:

> There is no reason why this Court should not also require the state to adopt a standard of proportional equality which takes account of the differing conditions and circumstances of a class of citizens whenever those conditions and circumstances stand in the way of their equal access to the enjoyment of basic rights or claims.[40]

But the view is open to question. If proportional equality is the underlying principle, then there is no reason why the benefits of reservations are restricted to the Hindu and Sikh scheduled castes only; why they are denied on conversion to faiths like Christianity and Buddhism and why the poor among the forward groups are not entitled to them.

Mathew, J., in his opinion stated that the test of equality of opportunity is equality of result. More forcefully, some claim that the

Constitution envisages it, and they justify reservations on that ground. As regards this view, apart from what has been noted before, it can be said that: (1) equality of result does not find an express mention in the Constitution, and (2) even if it can be implied, there is no reason why it should be confined to jobs only, and not to land, the most important resource in India, which provides livelihood for 70 percent of the population.[41]

The last conceptual basis of reservations that deserves notice is social justice. Although the term "social justice" has evoked caustic comments,[42] it finds a place in the preamble to the Constitution of India and in Article 38. In this context, a few points need mention. The term "social justice" is compendiously used to denote socioeconomic justice. The words "distributive justice" do not occur in the Constitution. Therefore, the concepts of distributive justice are covered in the rubric of social justice.

Are groups or individuals the target of affirmative action proposals? The general impression is that the reservations existed in favor of groups. But a different note has been struck by Choudhari, J., of the Andhra Pradesh High Court. After recalling the statement of Arthur Koestler that classes are unreal and individuals are real, he added:

> There are two other reasons which prompt me to think that Article 15(4) in the ultimate analysis thinks of individuals only. Of them one is that Article 15(4) forms an exception to the individual fundamental right guaranteed to the citizens as an individual under Articles 15 and 29. The exception could only deal with the same subject matter of the main enacting clause. The other is that the quality of backwardness can attach itself only to an individual and therefore the subject of backwardness can only be an individual.[43]

It should be mentioned that the concern of the learned judge is that the scarce resources of the poor nation should not be used for the discriminatory benefit of individuals who are already well advanced on the ground that they belong to a particular group.

The principle of social justice as the basis of reservations is capable of accommodating either of the views. It can to a greater degree rationalize the existing position that the Hindu and Sikh scheduled castes alone are entitled to benefits of reservations as backward classes. For

alone are entitled to benefits of reservations as backward classes. For in the case of Hindus, only the combination of social and economic disabilities existed in their worst form on the basis of religion and tradition.

Qualitative and Quantitative Aspects of Reservations

In view of the specific mention in the provisions of the Constitution, the inherent validity of reservations qua reservations was never in issue. On the other hand, the issues centered around two questions: (1) whether reservations should be confined to initial appointments only or they should be extended to promotions also; and (2) what should be the quantum or extent of reservation?

The first question was considered by the Supreme Court of India in General Manager, Southern Railway v. Rangachari.[44] There a railway employee challenged the directive of the general manager ordering the reservation of selection posts in Class III railway service for the benefit of the scheduled caste and the scheduled tribe employees. The Supreme Court of India by a majority of three to two upheld the directive. Delivering the majority opinion, Gajendragadkar, J., stated:

> The condition precedent for the exercise of the powers conferred by Article 16(4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its services. The condition precedent may refer either to the numerical inadaquecy of representation in the services or even to the qualitative inadequacy of representation. The advancement of the socially and educationally backward classes require not only that they should have representation in the lowest rung services but that they should aspire to secure representation in selection posts in the services as well.[45]

Reservations in promotions have given rise to much criticism and dissatisfaction. Firstly, it has been stated that reservations in promotions on the criterion of backwardness will demoralize the efficient and hardworking members in the services and is inimical to efficiency in services. Secondly, it has been urged that those who are holding a post or a job cannot be considered as belonging to the backward classes and therefore reservation in their favor is unjustified.

A similar question was considered with reference to admissions to the postgraduate courses. In M. Narasimha Rao v. State,[46] reservations in favor of backward classes in postgraduate medical courses were challenged. The reservations were upheld. But Choudary, J., doubting but not dissenting, added:

> Yet, I feel that a reservation in a post-graduate medical course on the ground of educational backwardness may not constitutionally be permissible because a Medical Graduate ex-hypothesi loses his educational backwardness.[47]

As regards quantum of reservation Balaji v. State of Mysore[48] is the leading case on the point. Though the case primarily deals with reservations in favor of "other backward classes" (backward classes other than those belonging to the scheduled castes and scheduled tribes), yet one of the principles laid down in it was followed in reservations for the scheduled castes and the scheduled tribes. There the government of Mysore passed an order providing for reservation up to 68 percent in services and in admissions to professional institutions like medical schools in favor of the scheduled castes, the scheduled tribes, and other backward classes. The petitioner, an applicant to the medical course, challenged the order. The Supreme Court inter alia held that reservation under Article 15(4) is in the nature of an exception and therefore reserved seats should be below 50 percent.

The Supreme Court in Devadasan v. Union of India[49] followed this principle as to the quantum of reservation in posts. There the "carry forward" rule applied by the central government was challenged. Under the rule, if in any year suitable candidates are not available from the scheduled castes and the scheduled tribes to fill the reserved vacancies, the reserved vacancies would be dereserved and filled by open competition. A corresponding number of reserved posts would be carried forward for the next year. Under the rule, the unfilled vacancies of the scheduled castes and the scheduled tribes could be carried forward for two years preceding the recruiting year. By the operation of the rule, it was possible that 54 percent of the vacancies would be filled by the reserved categories as against 46 percent available to the general pool. The court held that the

rule stated in Balaji's case is equally applicable in the case of posts. The majority of judges in Devadasan's case were also of the view that Article 16(1) lays down the general rule of equality of opportunity and Article 16(4) (which provides for reservations) is an exception to it; Subba Rao, J., expressed his dissent. In other words, according to him, there is no limit as to the number of seats that may be reserved by the state.

But the opinions in State of Kerala v. N. M. Thomas[50] cast a considerable doubt on the principle laid down in Devadasan's case. There, under the rules framed by the government of Kerala, exemptions for a limited period were granted in favor of the scheduled castes and the scheduled tribes employees from passing the departmental tests for promotion to higher posts. The result was that out of the 51 posts of upper-division clerks, 34 posts were filled by candidates belonging to a scheduled caste or a scheduled tribe who did not pass the test, and 17 were given to those who passed the test. The Supreme Court by a majority of five to two upheld the validity of the rules. Ray, C.J., and Beg, J., upheld the rules on the ground that they conferred exemption from passing the tests for a limited period only. But Krishna Iyer and Fazl Ali, J.J., went further and stated that Article 16(4) is not in the nature of an exception to Article 16(1), thus expressing considerable doubt on the ruling in Devadasan's case. But in A.B.S.K. Sangh (Rly) v. Union of India,[51] the Supreme Court clarified that the "carry forward" rule in the selection of scheduled caste and scheduled tribe candidates should not in any given year be "considerably in excess of 50%." To this proposition the rider was added that "some excess will not affect but that substantial excess will void the selection." The Court held that the "carry forward" rule is valid not only with selection posts but also with promotion posts. They also upheld the circular that a scheduled caste or a scheduled tribe candidate gets one grading higher than otherwise assignable to him, that is, if he is "good," he will be categorized as "very good," and if "very good" as "outstanding."

An Evaluation

Jobs and Positions. What is the impact of the policy of reservations over a period of three decades? No doubt, the share of the scheduled castes and the scheduled tribes in the services has increased. But their share in Class I and Class II services is still much less than their proportion in the population. According to the 1971 census, scheduled castes constitute 15.04 percent of the total population of the country and scheduled tribes 7.5 percent. The following figures,[52] indicating their representation in central government services for the years 1957, 1966, and 1979, chosen at random, will give an indication of the progress achieved in this direction:

Class I Services

| Year | % of Scheduled Castes | % of Scheduled Tribes |
|---|---|---|
| 1957 | 0.71 | 0.10 |
| 1966 | 1.77 | 0.52 |
| 1979 | 4.75 | 0.94 |

Class II Services

| | | |
|---|---|---|
| 1957 | 2.01 | 0.32 |
| 1966 | 3.25 | 0.27 |
| 1979 | 7.37 | 1.03 |

Class III Services

| | | |
|---|---|---|
| 1957 | 7.03 | 0.62 |
| 1966 | 8.86 | 1.10 |
| 1979 | 12.55 | 3.11 |

Class IV Services (excluding Sweepers and Scavengers)

| | | |
|---|---|---|
| 1957 | 22.10 | 2.44 |
| 1966 | 17.94 | 3.41 |
| 1979 | 19.32 | 5.19 |

Reservations apart from economic benefits give a measure of self-confidence and esteem to the disadvantaged groups. But dependence on government service alone is not in the interests of these groups. Certain diversification in occupational patterns becomes necessary. The Reports of the Commissioner for Scheduled Castes and Scheduled Tribes stress this

aspect.[53] Thus, licenses for running taxis and buses, and for carrying on certain commercial activities, are given to members of these groups.

But reliance on the largess of the state has resulted in certain kinds of distortions and inadequacies. After all reservations are concentrated in "intellectual spots." It is now proposed to consider these aspects briefly.

The general trend to look to reservations in educational institutions and in jobs as the main plank of affirmative action has led to a tendency toward the neglect or lack of emphasis on the problems that affect the poorest of poor in these groups. Two problems come to mind in this context: first is the problem of bonded labor, and the second is the enforcement of the minimum wages in agriculture. The mention of these does not imply the underestimation of other problems, like making provision for drinking-water facilities in villages. To understand these two problems, a brief mention must be made of the nature of agricultural labor in India.

The nature of agrarian labor relationships in India may be broadly classified as free and unfree. In free relationships, the labor has the freedom to stipulate the rate and the time for which he would serve. On the other hand, in unfree relationships, he loses the bargaining capacity. The bonded labor system that exists throughout India--by whatever name called--typifies this. Under the system, a person agrees to serve the master either for low wages or no wages (food and clothing being provided by the master) in consideration of a debt taken from the master. Being too poor, they are often not in a position to discharge the debt and a son inheriting the debt bondage of the father is not uncommon. Besides exploiting the illiteracy and ignorance of the bonded laborers, the masters frequently keep them under bondage even after the debts have been discharged. It has been stated that 66 percent of the bonded labor are from the scheduled castes. According to an estimate, there are 2.2 million bonded labor in India.[54]

Ever since 1920, some states have been enacting legislation to eradicate the practice, but these are marked by ineffective implementation. In 1975, the central government passed an ordinance that was subsequently

enacted as legislation making the practice an offense punishable by law. It created a machinery for the identification and release of the bonded labor. The initial years of the legislation were marked by earnestness in implementation, but subsequently, along with changes in the government, enthusiasm waned. One of the major problems in eliminating the system is the inability to develop adequate measures to rehabilitate the bonded laborers.

Many of the scheduled caste members eke out their livelihood as agricultural labor. "There is pronounced landlessness among Scheduled Caste workers (51%) as compared to Scheduled Tribes (33.04%) while only 20.20% of agricultural labourers were reported in the rest of population."[55] The work is of a seasonal character. Although there are statutory minimum wages fixed, they are hardly adhered to in practice. The reasons behind the ineffective implementation are: (1) large availability of surplus labor, (2) unorganized nature of agrarian labor, and (3) ineffective and insufficient staff in the field.[56] Similarly, not much has been achieved in diverting the members of these groups from unclean occupations to clean occupations, that is to say, to convert dry latrines into water-borne latrines. On this, the 26th Report says:

> It [in the commissioner's 1966-67 Report] was further recommended that even amongst Scheduled Castes and Scheduled Tribes, there were poorer and still poorer sections, neglected and even more neglected sections and the same kind of programmes for upliftment could not, therefore, apply to all these sections. . . . It is, therefore, desirable that the most backward communities amongst the Scheduled Castes and Scheduled Tribes should be identified and special programmes should be implemented for them by the Central as well as all the State Governments/Union Territory Administrations.[57]

Land Ownership. The importance of ownership of farmland can hardly be overemphasized in India, where 70 percent of the population depend on it for their livelihood. In the past, broadly speaking, law as well as poverty operated to deprive the scheduled castes of their share in the land. The affirmative programs envisage distribution of available farmland to the scheduled castes and the scheduled tribes. Two important sources of land are: (1) cultivable wastelands and (2) surplus land obtained by imposition of ceilings on agricultural holdings. As regards

the former, the Elayaperumal Committee noted that till August 1965, 3,916,676 acres of wasteland was distributed among the scheduled castes.[58] As regards the second, the state governments throughout India imposed ceilings on landholdings as a measure of social justice. The national guidelines provide that in the matter of allotment of surplus lands, preference should be given to landless laborers drawn from the scheduled castes and the scheduled tribes. Figures indicate that 529,392 acres have been distributed among the scheduled castes and the beneficiaries are 431,600 landless workers. The corresponding figures for the scheduled tribes are 248,639 acres and 126,392 beneficiaries.[59] However, it may be noted that notwithstanding the distribution of wasteland among these groups, during the period 1961-71, the number of cultivators among the scheduled castes declined from 378 to 279 per thousand, and from 681 to 576 per thousand among the scheduled tribes.[60] One reason for this could be that "many a time poor Scheduled Caste/Scheduled Tribe farmers have to lose their lands to money lenders from whom they borrow money at exorbitant rates."[61] The Bhola Paswan Commission suggested that there should be a law to prevent alienation of land by the scheduled castes.[62]

It may be noted that the position in the case of scheduled tribes is different. As noted earlier, they suffered from isolation rather than discrimination. In some regions, their position is no different from that of the scheduled castes, but in other regions they owned land. In their case, however, the nontribals, taking advantage of their innocence, ignorance, and illiteracy, purchase their lands at unconscionably low prices. Eleven states have enacted legislation prohibiting the transfer of land by a tribal to a nontribal. In three other states, the consent of a revenue official or other competent authority is necessary for transfer of land to a nontribal.[63] There are schemes to allot house sites to landless workers for construction of houses. Under these, till the end of 1978, out of 16,050,417 eligible families, 7,654,409 have been allotted house sites.

Education. There has been considerable rise in education of the scheduled castes and scheduled tribes as a result of the post-Independence

educational programs. The policy-makers envisaged education as a major instrument for the social and economic uplift of these groups. Apart from reservations in educational institutions, the major programs that have been developed for the purpose are: (1) exemption from school fees, (2) provisions for stipends or scholarships, (3) provisions for facilities like book grants, and (4) maintenance of hostels, or assistance to hostels for students from the scheduled castes. The central government provides for or sponsors the following: (1) postmatric scholarships, that is, for college education, (2) award of travel grants and (3) 7.5 percent reservation in favor of scheduled castes in merit scholarships. The programs also provide for assistance by way of special coaching for scheduled caste and scheduled tribe students residing in hostels and preexamination coaching facilities for students appearing in competitive examinations.

Impressive progress has been registered by these measures, although much still needs to be done. In 1931, the literacy among the scheduled castes was 1.90 percent as against the general literacy of 9.6 percent. In 1971, the literacy rose to 14.71 percent as against the general average of 29 percent. Thus the coefficient of equality rose from 25 percent to 50 percent.

$$\text{Coefficient of equality} = \frac{\text{Percentage of enrollment of S.C's to the total enrollment}}{\text{Percentage of S.C. population to the total population}}$$

Among the noteworthy features of affirmative action in the field of education is the institution of the postmatric scholarship scheme, that is, scholarships to finance education after the high school stage. The number of scheduled caste students who utilized it in 1944 was 114, and it steadily increased to 390,000 in 1978-79. The number of scheduled tribes pupils availing the benefit in 1978-79 was 70,000.[64]

Chitnis points out a major drawback of the policy of educational reservations, namely, that it "seems to take poor cognizance of the issue of academic preparedness or standards." The policy assumes that

given a leverage at the time of admissions, the students will somehow adapt to academic requirements. On this she concludes:

> To reserve, on the purely ascriptive criterion of caste, admission into a system that is essentially achievement-oriented in character and to do so without requiring any additional academic inputs to improve the performance of those who may be admitted in spite of being educationally backward, seems really to have been a sad mistake.[65]

The criticism is valid. It may also be pointed out that the state of Madhya Pradesh, in order to fill the reserved seats, reduced the eligibility requirements in medical colleges to the absurd level of 15 percent. Such a step will undermine the image of professionals drawn from these groups. Chitnis further refers to the following problems of a serious nature encountered in this context: (1) reluctance of prestigious educational institutions to reserve admissions, (2) inability of students admitted under reservations to cope with academic requirements, (3) restrictions of admissions to prestigious courses to the economic elite from among the scheduled castes, (4) a highly uneven representation of different scheduled castes in education, (5) cheating and misrepresentation in the use of the facility of reservations, and (6) a growing resentment against scheduled castes on the part of the nonscheduled castes. Of these consequences, 4 and 6 noted above need special mention here.

Evaluation studies indicate that a few castes among the scheduled castes are cornering the benefits. As an example, we may quote the following from the Bhola Paswan Report with reference to Haryana:

> Caste-wise analysis of the [postmatric scholarship] Scheme reveals that only 18 castes out of the 37 castes listed in the State were represented in the undergraduate course. Of these the Chamar caste constituted 79.97%, Dhanka 6.52%, Balmiki 5.33%, Khatik 1.91% and Od. 1.32%. All the other castes had less than 1% representation. In case of Post-graduate level 13 castes had representation, the major beneficiaries being Chamar (64.87%), Dhanka (7.22%), Balmiki (3.61%) and Megh (2.40%).[66]

That corrective action need be taken to fulfill the objectives behind the reservation is reflected in the following recommendation of the 26th Report:

> As a result of various educational development schemes, the first generation graduates from educationally backward Scheduled Tribe

communities and numerically and educationally weak Scheduled Caste communities have to face competition from comparatively more educationally advanced Scheduled Caste/Scheduled Tribe communities which result in denial of employment opportunities to them. This calls for a positive discrimination in favour of educationally less advanced Scheduled Caste/Scheduled Tribes communities in giving them educational facilities and employment opportunities.[67]

Tensions. The implementation of affirmative action programs for three decades has given rise to social tensions. These are reflected in the atrocities against the constitutionally preferred groups and in antireservation stirs.

The term "atrocity" is used in official and unofficial reports to denote "cases involving grave offences like murder, rape, arson, violence resulting in grievous hurt and such other cases." The following table shows the rise in atrocities:

| Year | Number of Cases of Atrocities | | Total[68] |
|---|---|---|---|
| | S.C. | S.T. | |
| 1976 | 6,197 | 1,065 | 7,262 |
| 1977 | 10,879 | 1,138 | 12,017 |
| 1978 | 15,053 | 1,632 | 16,685 |
| 1979 | 13,426 | 367 | 13,793 |

The 26th Report points out disputes over minimum wages as an important factor responsible for the atrocities. The other reason for atrocities is agrarian tensions. When surplus land, obtained by the imposition of ceilings, is distributed among the landless scheduled castes or tribes, the persons affected thereby try to wreak vengeance against the allottees.

Reservations have given rise to a distinct trend toward an organized demand for the abolition of reservations. In the state of Gujarat, a section of doctors demanded abolition of reservations in postgraduate medical courses, which subsequently spread to other parts of the state, resulting in violent incidents. Also, there can be no doubt that the principle of reservations in promotions has given rise to much discontent among the government employees. The nonscheduled caste and nonscheduled tribe employees formed associations to press their demand for the abolition of reservations. The commissioner for the scheduled castes and the scheduled

tribes recommended that disciplinary action should be taken against the employees participating in demands for abolition of reservations. But the Department of Personnel, on the other hand, is of the view that the activities in question do not constitute violation of conduct rules. It should be noted that right to form associations is a fundamental right under the Indian Constitution.

As regards efficiency, there can be no doubt that reservations affect efficiency in services. This has been generally assumed both by the supporters and by the opponents of reservations--though the supporters of reservations deemphasize efficiency. We have noted that Article 335 of the Constitution subordinates reservations to considerations of efficiency. However, regrettably there are, as yet, no studies on the nature and extent of impairment of efficiency arising out of reservations in services.

Though there is still much to be achieved in the field of affirmative action, nonetheless it is relevant to add a note of caution. Reservation is a useful way to achieve short-term objectives, but its prolonged continuation will be inimical to the long-term goals and values of a nation, like fraternity and efficiency in society. The beneficiaries of affirmative programs are chosen on ethnic considerations, and in due course the ethnic groups acquire a vested interest in reservations. The Indian experience with respect to the other backward classes suggests that reservations, when once given, cannot be withdrawn subsequently, and thus tend to perpetuate themselves. They give rise to similar demands from other ethnic groups and one notices a competition for recognition as being "backward." After an initial period of result in terms of social justice, the law of diminishing returns appears to operate, for, as noted earlier, the advanced sections among the disadvantaged groups tend to siphon off the benefits. The system has not, as yet, shown resilience to transform the ethnic criterion for affirmative action to a status of underprivileged groups. Thus, the need for finding checks and balances in the system of affirmative action to fulfill the social-justice objectives still remains.

NOTES

1. Andre Beteille, The Backward Classes and the New Social Order (New Delhi, Oxford University Press, 1981), p. 41.

2. The great law-giver of Hindus in ancient times (200 B.C.-A.D. 200). His work Manu Smriti was considered as an unquestionable authority and held sway till recent times.

3. Laws of Manu, X, The Sacred Books of the East Series, 50 volumes, vol. 25 (1964), reprint (Motilal Banarsi Das, Delhi, ed. F. Max Muller, translated by G. Buhler), p. 51.

4. See generally P. V. Kane, History of Dharmasastra, vol. II, 2nd ed. 5 vols. (Bhandarkar Oriental Research Institute, Poona, 1974), p. 168.

5. The traditional Hindu society was divided into four castes, namely, the Brahmins (the priestly caste), the Kshatriyas (the warrior caste), the Vaishyas (the trading caste), and the Shudras (the servile caste).

6. Article 46, the Constitution of India.

7. Railways, airways, defense production, insurance, oil exploration, all major banks, and the major portion of steel and fertilizer production are owned by the state.

8. Article 15(1), the Constitution of India.

9. Article 15(4), the Constitution of India.

10. "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State," Article 16(1), the Constitution of India.

11. Article 16(4), the Constitution of India.

12. Per K. Iyer, in State of Kerala v. N. M. Thomas, All India Reporter, 1976 S.C. 490, 528, per Fazl Ali id. at 552. Also per Ray, C.J., id. at 500.

13. Regents of University of California v. Bakke, 98 S. ct. 2733, 2757 (1978).

14. Article 335, the Constitution of India.

15. All India Reporter, 1959, S.C. 1318.

16. Article 330, the Constitution of India.

17. Article 341: "Scheduled Castes--(1) The President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or part of or groups within castes, races or tribes which shall for the purpose of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory as the case may be."

18. Article 342: "Scheduled Tribes--(1)The President may with respect to any State or Union Territory and where it is a State, after consultation with the Governor thereof by public notification specify the tribes or tribal communities or part of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union Territory, as the case may be."

19. The actual number of castes will be considerably less, for the same caste may be repeated in the lists of other states.

20. Basavalingappa v. Munichinappa, All India Reporter, 1955 S.C.1260.

21. On this see G. Austin, The Indian Constitution: Cornerstone of a Nation (1974 reprint, Oxford University Press, New Delhi), p. 154.

22. K. C. Alexander, "The Neo-Christians in Kerala," in Michael Mahar (ed.) The Untouchables in Contemporary India (Tucson, University of Arizona Press, 1972), p. 156.

23. All India Reporter, 1965, S.C. 1179.

24. Lok Sabha Debates, 1977, 6th series, vol. 7, no. 6 (Lok Sabha Secretariat, New Delhi), dated November 21, 1977, col. 367.

25. The Hindu Marriages Validity Act, 1946, and the Hindu Marriage Act, 1955.

26. All India Reporter, 1975, Del. 115.

27. Report of the Commissioner for Scheduled Castes and Scheduled Tribes (July 1978-March 1979), First Report (Delhi Controller of Publications, Government of India, 1980), para 5.44. (Hereafter referred to as the Bhola Paswan Report.)

28. All India Reporter, 1980, Del. 60.

29. Ibid. at 66.

30. Ibid.

31. Report of the Committee on Untouchability, Economic and Education Development of the Scheduled Castes and Connected Documents 1969 (Delhi, Controller of Publications, Government of India, 1976), p. 207. (Hereafter referred to as Elayaperumal Committee Report.)

32. Krishna Iyer, J., in State of Kerala v. Thomas, All India Reporter 1976, S.C. 490 at 527.

33. J. W. Nickel, "Preferential Policies in Hiring and Admissions: A Jurisprudential Approach," 75 Col. L. Rev. 537 (1975).

34. B. R. Gross, Discrimination in Reverse: Is Turnabout Fair Play? (New York, New York University Press, 1978), p. 33.

35. Walter Guzzardi, Jr. "The Right Way to Strive for Equality," The American Review, vol. 25(2) (1981), pp. 11 at 13.

36. Andre Beteille, Backward Classes and the New Social Order (New Delhi, Oxford University Press, 1982), p. 25.

37. All India Reporter, 1976, S.C. 490.

38. 351 U.S. 12(1955).

39. 372 U.S. 353 (1963).

40. All India Reporter, 1976, S.C. 490, at 517-18.

41. The argument is not made merely as a debating point. It may be recalled that Dr. Ambedkar, the great leader of the scheduled castes, advocated socialization of land after paying compensation to the existing owners.

42. Hayek says that the term "social justice" is "intellectually disreputable, the mark of demagogy or cheap journalism"; F. A. Hayek, Law Legislation and Liberty (3 vols. Routledge and Kegan Paul, London and Henley, 1976), vol. 2, p. 97; Allen says that he is not sure that "those who use the term most glibly know clearly what they mean by it"; C. K. Allen, Aspects of Justice (Oxford University Press, London, 6th ed., 1958), p. 31.

43. All India Reporter, 1980, A.P. 104, 115 (F.B.).

44. All India Reporter, 1962, S.C. 36.

45. Id. at 44.

46. All India Reporter, 1980, A.P. 104 (F.B.).

47. Id. at 114.

48. All India Reporter, 1963, S.C. 649.

49. All India Reporter, 1964, S.C. 179.

50. All India Reporter, 1976, S.C. 490.

51. All India Reporter, 1981, S.C. 229.

52. Sources: For 1957 and 1966, Handbook on Scheduled Castes and Scheduled Tribes (Office of the Commissioner for the Scheduled Castes and the Scheduled Tribes), pp. 88-89 and 91-92 (1968); figures for 1979 are taken from the 26th Report of the Commissioner for the Scheduled Castes and the Scheduled Tribes, part II (Delhi, Controller of Publications, Government of India, 1980), p. 25. (Hereafter referred to as the 26th Report.)

53. 26th Report, supra part I at 126-130.

54. Bhola Paswan Report, supra note 27 at 34.

55. 26th Report, supra note 52, part I at 9.

56. Bhola Paswan Report supra note 27 at 39 says: "This was partly due to ineffective and insufficient staff in the field."

57. 26th Report, supra note 52, part I at 102.

58. Elayaperumal Committee Report, supra note 31 at 117.

59. 26th Report, supra note 52, part II at 125-126.

60. Bhola Paswan Report, supra note 27 at 30.

61. Ibid.

62. Id. at 34.

63. For details see 26th Report, supra note 52, part II, at 126-127.

64. 26th Report, supra note 52 at 170.

65. S. Chitnis, "Reservations in Education--the Policy and Practice," in Removal of Untouchability (ed. V. P. Shah, Ahmedabad, Department of Sociology, Gujarat University, 1980), p. 5.

66. Bhola Paswan Report, supra note 27 at 188.

67. 26th Report, supra note 52 at 8.

68. Source: Id. at 231.